

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of )

Qwest Communications International Inc. )  
And U S WEST, Inc. )

CC Docket No. 99-272

Applications for Transfer of Control of )  
Domestic and International Sections 214 and )  
310 Authorizations and Applications to )  
Transfer Control of a Submarine Cable )  
Landing License )

### MEMORANDUM OPINION AND ORDER

Adopted: June 23, 2000

Released: June 26, 2000

By the Commission:

#### I. INTRODUCTION

1. On March 10, 2000, we found that the proposed merger of U S WEST, Inc. (U S WEST) and Qwest Communications International Inc. (Qwest) would serve the public interest, but that consummation of the merger was subject to our determination that the Applicants would comply with section 271 of the Communications Act by divesting Qwest's interLATA businesses originating in the U S WEST region.<sup>1</sup> In this Order, we conclude that the proposed divestiture of Qwest's interLATA in-region services, customers, and assets in the 14-state U S WEST region is consistent with the requirements of section 271. Accordingly, once Qwest has divested itself of its customers, services and assets in the U S WEST region consistent with its proposal in this proceeding, it may proceed with its merger with U S WEST.<sup>2</sup>

<sup>1</sup> On March 17, 2000, Qwest and Touch America, Inc. (Touch America) filed applications pursuant to section 214 of the Communications Act, 47 U.S.C. § 214, seeking consent to the transfer of control of TeleDistance, Inc., a Qwest subsidiary holding domestic and international section 214 authority, from Qwest to Touch America. *Application Seeks FCC Consent for Transfer of Control of Certain Section 214 Authorizations From Qwest to Touch America*, DA 00-919 Public Notice (rel. April 25, 2000). The Commission granted the international section 214 application on May 9, 2000. *International Authorizations Granted*, DA 00-1049 Public Notice (rel. May 11, 2000). In this Order, we approve the transfer of control of TeleDistance, Inc. from Qwest to Touch America pursuant to the domestic section 214 application filed.

<sup>2</sup> We note that our finding that the proposed divestiture will not violate section 271, is based on the facts presented in the instant proceeding and Qwest's representations to the Commission. Our finding does not insulate (continued....)

## II. BACKGROUND

2. On August 19, 1999, Qwest and U S WEST filed joint applications pursuant to sections 214 and 310 of the Communications Act and sections 34 through 39 of the Cable Landing License Act (Applications), asking the Commission to approve the transfer of control of licenses and lines necessary for their proposed merger to take place.<sup>3</sup> Pursuant to section 271 of the Communications Act, U S WEST may not provide in-region interLATA services until the Commission determines that U S WEST has taken certain steps to open its local exchange market to competition.<sup>4</sup>

3. On March 10, 2000, the Commission issued a Memorandum Opinion and Order (March 10th Order) approving the Applications subject to the requirement that, prior to closing the merger, Qwest and U S WEST (the Applicants) must comply with section 271 of the Communications Act by divesting Qwest's interLATA services originating in the U S WEST region.<sup>5</sup> The March 10th Order also required that the Applicants submit a divestiture report describing the proposed divestiture plans for approval by the Commission.<sup>6</sup> In particular, the Commission stated that the licenses and lines could not be transferred as required for the merger until: (i) the full Commission determines that the divestiture would result in a merger that  
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Qwest or its affiliates from complaints or Commission-initiated enforcement actions regarding Qwest's future compliance with section 271.

<sup>3</sup> See *Applications for Transfer of Control*, filed August 19, 1999 (CC Docket No. 99-272) (Applications).

<sup>4</sup> 47 U.S.C. § 271. Section 271(a) states that "[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section." Section 271 specifies that a Bell Operating Company may "provide interLATA services originating in any of its in-region States . . ." once it demonstrates that it has opened its local exchange market to competition. 47 U.S.C. § 271(b)(1). To date, U S WEST has not obtained such authority in any of its in-region states.

<sup>5</sup> *In the Matter of Qwest Communications International Inc. and U S WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, CC Docket No. 99-272, FCC 00-91 (rel. March 10, 2000).

<sup>6</sup> The March 10th Order states:

We find that, in order to comply with section 271, the Applicants must completely divest Qwest's interLATA business originating in the U S WEST region prior to closing the merger. We require that prior to closing the merger, the Applicants must submit a full report identifying the buyer of the divested businesses; details on any and all activities provided by the merged entity on behalf of the buyer; the term sheets; and the contract of sale, including any agreements related to the support services. We specifically note that Applicants must also provide information about any relationship between the Applicants and the buyer of the divested assets that do not involve the provision of support services, including but not limited to any joint or cooperative marketing or sourcing arrangements. The divestiture report must be complete and all relevant information we request regarding the divestiture must be submitted before the notice and comment period may begin.

March 10th Order, para 3. See also, *id.* paras. 25-27.

satisfies section 271; and (ii) any such divestiture has been consummated. We further stated that we would issue a second order in this docket addressing whether the proposed divestiture satisfied the requirements of section 271.

4. On April 14, 2000, Qwest submitted a detailed divestiture report<sup>7</sup> in which Qwest proposes to irrevocably sell its in-region interLATA businesses to Touch America, Inc.<sup>8</sup> Qwest states that the "report provides a complete discussion of Qwest's pending transaction with Touch America, Inc. . . . [and] explains in detail: (i) the services to be assumed by Touch America; (ii) the network assets and employees it is acquiring; and (iii) all agreements and understandings between the parties."<sup>9</sup> Qwest adds that "the report also addresses every other issue identified by the Commission in the [March 10th Order], and demonstrates that Qwest will be in full compliance with Section 271 at the time of the U S WEST merger closing."<sup>10</sup> On the day Qwest filed its divestiture report, the Commission issued a public notice seeking comment on whether the divestiture, as described in Qwest's divestiture report, would result in a merger that complies with section 271 and Commission precedent in *AT&T v. Ameritech*<sup>11</sup> interpreting the prohibition

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<sup>7</sup> Letter from R. Steven Davis, Senior Vice President, Governmental Affairs, Qwest, to Magalie Roman Salas, Secretary, FCC, April 14, 2000 (divestiture report). In addition to the divestiture report, Qwest has made a number of revisions to its original divestiture plan. See Letter from David L. Sieradzki, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, May 12, 2000, Attachment C (Amendments to Stock Purchase Agreement); Letter from David L. Sieradzki, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, May 15, 2000 (containing latest version of Local Access Assignment and Assumption Agreement; and latest version of the Switch Functionality Access Right Agreement); Letter from Peter A. Rohrbach, Counsel of Qwest, to Magalie Roman Salas, Secretary, FCC, June 7, 2000 (Qwest June 7 *Ex Parte*); Letter from David L. Sieradzki, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, June 21, 2000 (Qwest June 21 *Ex Parte*). We incorporate herein by reference all agreements between Touch America and Qwest filed in this proceeding.

<sup>8</sup> Divestiture Report at 13. Touch America is a wholly owned telecommunications subsidiary of the Montana Power Company, an electric utility providing long distance services, private line services, Internet services and business telephone equipment since 1983. Divestiture Report at 10-11. Touch America has a 11,000 mile-high-speed fiber optic network, which traverses several states in the U S WEST region, as well as extending to California, Texas, Wisconsin and Illinois. See Touch America's Internet web site, <http://www.tamerica.com>. Touch America expects its network to increase to 26,000 mile fiber optic route miles by the end of 2001. Touch America also holds LMDS licenses in 24 markets along its fiber optic routes. Touch America Reply Comments (May 12, 2000) at 6. In addition to purchasing Qwest's in-region network assets as part of Touch America's planned expansion, Montana Power plans to sell its multiple energy businesses, leaving Touch America the surviving business. See Montana Power/Touch America Press Release, "Montana Power to Divest Energy Businesses, Company to Become Touch America" (March 28, 2000).

<sup>9</sup> Letter from R. Steven Davis, Senior Vice President, Governmental Affairs, Qwest, to Magalie R. Salas, Secretary, FCC, April 14, 2000.

<sup>10</sup> Divestiture Report at 13. As required in the March 10th Order, a senior Qwest executive certified that the divestiture report is true and accurate. March 10th Order, para. 26. See Divestiture Report, Affidavit of Dominic A. Gomez, Senior Vice President of Qwest.

<sup>11</sup> *In the Matter of AT&T, Corporation et al., v. Ameritech Corporation and Qwest Communications Corporation; AT&T Corporation et al., v. U S WEST Communications and Qwest Communications Corporation; McLeodUSA Telecommunications Services, Inc. v. U S WEST Inc.*, Memorandum Opinion and Order, 13 FCC Rcd (continued....)

on the provision of interLATA in-region service.<sup>12</sup> AT&T was the sole party to file comments opposing the divestiture report.<sup>13</sup>

### III. DISCUSSION

5. Based on the record in this proceeding, we conclude that the proposed divestiture will allow the merger to proceed in compliance with the requirements of section 271. Qwest is divesting all prohibited in-region interLATA services and customers and will not be performing in-region interLATA transmission prohibited by section 271. The record also demonstrates that the divestiture is a legitimate, arms-length transaction.<sup>14</sup> As described below, the arrangements associated with the divestiture are not inconsistent with section 271 as interpreted by the Commission in *AT&T v. Ameritech*. While we find that the assignment to Touch America of certain contracts with Qwest's pre-existing customers, sales agents and distributors is permissible, we will not permit the renewal of certain discount and sales commission terms, as described below. Moreover, the measures for transitional support services by Qwest to Touch America do not constitute the "provision" by Qwest of prohibited in-region interLATA service under the "totality of the circumstances" presently before us. Further, we conclude that Qwest's current plans for the provision of special products, including calling cards, prepaid calling cards and operator services are consistent with section 271. Qwest's present plans for the provision of Internet services are also acceptable. The divestiture report also demonstrates that Qwest's affiliates will comply with section 271.

#### A. Section 271 Standard

6. Section 271(a) states that "[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section."<sup>15</sup> Section 271 specifies that a Bell Operating Company "may provide interLATA services originating in any of its in-region States" once it demonstrates that it has opened its local

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21438 (1988) (*AT&T v. Ameritech*) *aff'd sub nom. U.S. WEST v. FCC*, 177 F. 3d 1057 (D.C. Cir. 1999), *cert. Denied*, (Feb. 28, 2000) (No. 99-869).

<sup>12</sup> See, *Qwest Communications International, Inc. Submits Report on Proposed Divestiture of In-region InterLATA Assets*, CC Docket No. 99-272, DA 00-874 Public Notice (rel. April 14, 2000).

<sup>13</sup> AT&T Comments, May 5, 2000 (AT&T May 5 Comments); see also Letter from Aryeh S. Friedman, AT&T to Magalie Roman Salas, Secretary, FCC, June 2, 2000 (AT&T June 2 *Ex Parte*); Letter from Aryeh S. Friedman, Senior Attorney, AT&T, to Magalie Roman Salas, Secretary, FCC, June 13, 2000. Qwest and Touch America filed comments responding to AT&T's Comments on May 12, 2000 (Qwest Reply Comments, May 12, 2000 (Qwest Reply Comments); Touch America Reply Comments, May 12, 2000 (Touch America Reply Comments)).

<sup>14</sup> Although AT&T correctly points out that Qwest will retain its in-region fiber network and other facilities, Qwest states that it will not operate these facilities for services originating in-region before it properly obtains section 271 authorization. AT&T Comments at 11-13; Divestiture Report at 28, 30.

<sup>15</sup> 47 U.S.C. § 271(a).

exchange market to competition.<sup>16</sup> Section 271 of the Communications Act reflects Congress' view that to permit the BOCs immediate entry into the long distance market before local markets are opened would allow the BOCs to leverage their local exchange bottleneck control into the long distance market and thus both threaten competition in the long distance market and entrench their monopoly in the local market.<sup>17</sup> Moreover, Congress recognized that unless the BOCs had some affirmative incentive to open their local markets to competition, competition would be highly unlikely to develop expeditiously in the local exchange and exchange access markets.<sup>18</sup>

7. In *AT&T v. Ameritech*, the Commission interpreted section 271's statutory ban on BOC provision of prohibited long distance in-region interLATA services to bar certain business arrangements even when the BOC did not actually perform the prohibited interLATA transmission. The Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision stating that the Commission's "reading of 'provide' to include the BOCs' actions here . . . appears clearly reasonable."<sup>19</sup> In evaluating the BOC's actions, we consider the totality of its involvement, rather than focus on any one particular activity.<sup>20</sup> We balance several factors including, but not limited to, whether the BOC obtains material benefits uniquely associated with its ability to include a long distance component in a combined service offering, whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public.<sup>21</sup>

#### **B. Divested Services, Customers, Assets**

8. In this section, we describe the services, customers and assets that Qwest will transfer to Touch America prior to merging with U S WEST as well as the Qwest support services, employees and other Qwest agents<sup>22</sup> that will be transferred to Touch America as part of the transaction. In its divestiture report, Qwest states that by divesting these services, customers and assets "Qwest will not be engaged in any activity that would violate section 271."<sup>23</sup>

9. Services to be Assumed by Touch America In its divestiture report, Qwest states it will sell to Touch America:

<sup>16</sup> 47 U.S.C. § 271(b)(1).

<sup>17</sup> *AT&T v. Ameritech*, 13 FCC Rcd 21432-33, para. 5.

<sup>18</sup> *Id.*

<sup>19</sup> *U.S. WEST v. FCC*, 177 F.3d. 1057, 1060.

<sup>20</sup> *AT&T v. Ameritech*, 13 FCC Rcd at 21465-66, para. 37.

<sup>21</sup> *Id.*

<sup>22</sup> *E.g.*, third-party sales agents and distributors.

<sup>23</sup> Divestiture Report at 8.

- All interLATA and intraLATA switched long distance services that Qwest provides to presubscribed customer lines located in the 14 U S WEST states, including intrastate, interstate and international services;
- All toll-free (800, 888, and 877) switched services that terminate at a customer location in the 14 U S WEST states;
- All dedicated services that cross LATA boundaries and that have one or both termination points located in the 14 U S WEST states, including private lines, dedicated access lines, and frame relay/asynchronous transfer mode (ATM) circuits;
- All interLATA and intraLATA calling card calls and prepaid card calls originating anywhere in the 14 U S WEST states;
- All incidental operator services calls in the 14 U S WEST states, including interLATA and intraLATA operator services from payphones, hotel phones, and other phones owned by aggregators;<sup>24</sup> and
- In-region interLATA telecommunications services associated with information services.<sup>25</sup>

10. With respect to Qwest voice customers that currently purchase both in-region and out-of region long-distance service, Touch America will assume responsibility for all services originating in-region through the duration of the in-region portion of the contracts.<sup>26</sup> Qwest will be separately responsible for the services originating out-of-region and will set rates, terms and conditions for the out-of-region services. Some current Qwest contracts specify that the customer must meet minimum volumes or that the customer is entitled to higher discount levels when it achieves specified volumes.<sup>27</sup> For these existing contracts, Qwest proposes to maintain these volume commitments and discounts based upon the sum of the customers' out-of-region volumes with Qwest and their in-region volumes with Touch America.<sup>28</sup>

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<sup>24</sup> *Id.* at 14. The term "aggregator" means "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operators services." 47 U.S.C. § 226(a)(2).

<sup>25</sup> Divestiture Report at 14.

<sup>26</sup> Divestiture Report at 16.

<sup>27</sup> *Id.* at 16 n. 16.

<sup>28</sup> *Id.* "This treatment will allow Qwest and Touch America to honor the existing contractual commitments to these preexisting customers. It will require limited back-office sharing of customer volume data to determine (continued....)"

11. Network Assets to be Bought or Leased by Touch America. Qwest will sell or lease to Touch America “certain network assets to expand Touch America’s capacity.”<sup>29</sup> Touch America will purchase from Qwest: a limited amount of dark fiber sold under indefeasible rights of use contracts, optronic equipment to light the fiber, and eleven data switches.<sup>30</sup> Additionally, Touch America will lease a number of circuit switches.<sup>31</sup> Touch America has an option to purchase these circuit switches at a specified price at the end of the lease period. Touch America and Qwest also have agreed to reciprocal wholesale contracts that would enable each company to purchase transmission capacity on a wholesale basis.<sup>32</sup>

12. Employees and Agents to be Transferred to Touch America. As part of the divestiture agreement, Touch America will offer employment to approximately 120 Qwest in-region sales employees.<sup>33</sup> Qwest also plans to assign contracts with certain third-party vendors and platform operators to Touch America. In addition, Qwest plans to assign all in-region contracts with sales agents and distribution channels to Touch America. Touch America will be responsible for paying all commissions on in-region sales “and meeting other in-region-related obligations.”<sup>34</sup> Simultaneously, the agents will remain responsible to Qwest for existing out-of-region obligations.<sup>35</sup> Qwest intends to honor pre-existing contracts for minimum volumes, commissions with these agents and distributors based on the total sales of both Qwest and Touch America services. Furthermore, Qwest will coordinate computation of these commission payments on behalf of Touch America for this group of sales agents. Although these arrangements will be available only to pre-existing agents and distributors, and only under the terms of their pre-existing contracts, the agents can extend the arrangements.

13. Analysis. Based upon the description of the customers, services and assets being transferred to Touch America, we conclude that Qwest’s proposed divestiture of services, customers and assets to Touch America will ensure that Qwest will not provide prohibited in-region interLATA services. Qwest will sell all of its interLATA and intraLATA originating switched long distance service within the U S WEST region. Additionally, Qwest will sell to Touch America all retail and wholesale private line voice and data services where a circuit provided to a customer crosses a U S WEST LATA boundary, and will receive no revenues from

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total customer volumes so that Touch America and Qwest can correctly bill these customers for their respective services.”

<sup>29</sup> *Id.* at 19.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 21.

<sup>33</sup> *Id.* at 22 n. 33.

<sup>34</sup> *Id.* at 23.

<sup>35</sup> *Id.*

these in-region interLATA services.<sup>36</sup> Therefore, we believe that Applicants have designed a divestiture that will comply with the section 271 prohibition on the BOCs performing interLATA transmission.

14. Qwest states that there are no side agreements to return these customers, services and assets to Qwest at a later date and that it is “irrevocably transferring its in-region business once and forever—with no continuing financial interest, and no option to repurchase.”<sup>37</sup> The purchaser, Touch America, is a facilities-based company with a substantial network. Indeed, it is in the process of constructing a 26,000 fiber mile network.<sup>38</sup> Touch America’s filings state that it is “committed to being a nationwide facilities based carrier that will compete head-to-head with Qwest for national accounts.”<sup>39</sup> Moreover, Touch America’s owner, the Montana Power Company, intends to sell off its public utilities business to “sharpen [its] focus on [its] fast-growing telecommunications activities.”<sup>40</sup> Thus, it is clear to us that Touch America intends to keep the telecommunications customers, services and assets and grow as a telecommunications concern.<sup>41</sup> Contrary to AT&T’s allegations, the transaction is not part of a collusive arrangement to “park” assets temporarily.<sup>42</sup> These facts persuade us that the proposed divestiture is an arm’s length transaction. Moreover, there is no evidence that Qwest would be able to exert control over Touch America.<sup>43</sup> Qwest will perform a very limited set of support services (with the retail

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<sup>36</sup> See AT&T *Ex Parte* at 1. AT&T Comments at 11 (“[I]t is apparent from these Agreements that all Qwest is divesting is the in-region interLATA transport itself.” Indeed, the Stock Purchase Agreement narrowly defines ‘Transferred Services’ and ‘Transferred Customers’ to mean no more than ‘Transport (i.e. transmission) Services.’”). In fact, as Qwest points out, the definitions of “Transport Services,” “Transferred Services,” and “Transferred Services Rights” includes a detailed, three-page description of the telecommunications services being divested. Qwest Point by Point Response at 11.

<sup>37</sup> Qwest’s Reply Comment at 1.

<sup>38</sup> Touch America Reply Comment at 4.

<sup>39</sup> Touch America March 27 *Ex Parte* at 8.

<sup>40</sup> Montana Power/Touch America Press Release, “Montana Power to Divest Energy Businesses, Company to Become Touch America” (March 28, 2000); Touch America Reply Comments at 7.

<sup>41</sup> AT&T correctly points out that the agreements restrict for six-months Touch America’s right to sell the business to other parties. Moreover, a “change of control at any time” apparently is grounds for Qwest to terminate all other agreements such as support services. Because we agree with Qwest that an immediate sale of the assets by Touch America to a third-party would likely reduce customer retention, we find the six-month restriction reasonable. Qwest Reply Comments at 13. Moreover, as Qwest points out, “the Agreements only provide that Qwest has the right to terminate upon a change of control; they do not require termination.” Qwest Point by Point Response at 15.

<sup>42</sup> AT&T Comments at 1; Touch America Reply Comment 4; Qwest states that there are no side agreements to return these assets to Qwest at a later date and that it is “irrevocably transferring its in-region business once and forever—with no continuing financial interest and no option to repurchase.” Qwest Reply Comments at 1.

<sup>43</sup> Moreover, Qwest will be unable to influence customers’ choices of in-region services, and will have no ability to determine or influence the price level or product structure of in-region interLATA services provided by (continued....)



service always branded as Touch America) for a limited group of in-region customers.<sup>44</sup>

15. These conclusions are not undermined by the contract price negotiated by Touch America and Qwest.<sup>45</sup> AT&T states that the contract price suggests that the transaction is insignificant or perhaps a parking arrangement. We disagree. Divestiture sales can result in a lower price than other arm's length transactions. In the instant case, Qwest asserts that the approximate contract price of \$193 million reflects an arm's length negotiation for assets that the bargaining parties well knew must be sold to comply with section 271.<sup>46</sup> Consequently, the price is likely to be somewhat lower than that which may have been obtained for these same assets in the absence of the mandatory sale and time constraints caused by the statutory requirements. Qwest states that the contract price is reasonable in light of "the very significant start-up capital investments that any buyer would need in order to run the acquired business successfully, including additional expenditure on network infrastructure, above and beyond the acquisition price; the risks involved in buying this business (e.g., the risk of losing customers after the transaction closes); the relatively small number of potential purchasers with sufficient cash and capability to provide the services; and Qwest's desire to close the deal in an expeditious manner."<sup>47</sup> Because we are satisfied, based upon the facts before us, that all aspects of this particular divestiture were negotiated as part of an arm's length transaction, we find no basis for questioning the contract price in this case.

16. AT&T further argues that the insignificance of the transfer can be demonstrated by the fact that certain "top Commercial accounts" served by Qwest out-of-region, and by Touch America in-region, receive disproportionately more services from Qwest than from Touch America.<sup>48</sup> We reject this argument. Most of Qwest's customers are located outside the 14 U S WEST states, i.e., out-of-region.<sup>49</sup> Hence, it follows that Qwest would offer more long distance services out-of-region than within the 14 states. The smaller proportion of divested in-region services compared to the amount of Qwest out-of-region services merely reflects the size of the required divestiture.

17. AT&T argues that Qwest will violate section 271 because the Bilateral Wholesale Agreement contemplates that calls originating in-region are to be switched to Qwest's facilities  
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Touch America. Moreover, we agree with Qwest that Touch America is capable of "independent responsibility for every aspect of the in-region interLATA business." Qwest Reply Comment at 4.

<sup>44</sup> Divestiture Report at 31; Qwest Reply Comments at 4. See also discussion of transitional support services in paragraphs 25-33, *infra*.

<sup>45</sup> AT&T Comments at 5; AT&T *Ex Parte* at 15.

<sup>46</sup> See Divestiture Report at 3.

<sup>47</sup> Qwest Point by Point Response at 2.

<sup>48</sup> AT&T Comments at 5.

<sup>49</sup> "Qwest is a nondominant interexchange carrier with the large majority of its operations outside the U S WEST region." Applications at 12.

and not Touch America's (or if Touch America does not have a presence there, then another interexchange carrier with a more competitive rate), with the result that Qwest will obtain a portion of the revenues from in-region customers. We reject that assertion.<sup>50</sup> As Qwest points out, Touch America has no commitment to purchase wholesale service from Qwest.<sup>51</sup> Touch America "is free to build its own network or buy service from 'another interexchange carrier with a more competitive rate.'"<sup>52</sup> The Bilateral Wholesale Agreement merely provides the prices, terms, and conditions under which Qwest and Touch America will make capacity available to one another, if desired. The contractual provision permits Qwest to compete, as allowed by section 271, "for out-of-region service to an independent carrier."<sup>53</sup>

18. Contrary to AT&T's assertions, we find the temporary use of the combined volume commitments and discounts for voice customers that currently purchase both in-region and out-of region service acceptable under section 271 to the extent it provides a transitional device to satisfy customer expectations during the current service term for contracts pre-dating the divestiture.<sup>54</sup> Such a contract provision is unlikely to provide Qwest with a significant advantage or undermine its incentives for section 271 compliance if the volume commitment or discount is phased out as the initial contract terms expire over the next few years. Accordingly,

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<sup>50</sup> Qwest points out that the reference to a marketing agreement in Section 2(c) of the Bilateral Wholesale Agreement, cited to by AT&T, is simply an editing oversight that "should have been removed" from later versions of the document. Thus, as we required in the March 10th Order, there will be no joint marketing or coordinated sourcing between Qwest and Touch America. We also find credible Qwest's representation that "this reference in the Bilateral Wholesale Agreement, as well as other, similar stray references that occur elsewhere in the documents " will be removed. Qwest Point by Point Response at 13; AT&T Comments at 17 n. 52.

<sup>51</sup> Qwest states:

Touch America may supplement its own facilities and leased off-network capacity on other carriers with out-of-region Qwest wholesale services. However, Touch America is not required to use Qwest. To accommodate Touch America's network, existing Qwest dedicated service to common customers is being rehomed to meet Touch America at its network in Chicago, El Paso and Los Angeles. Touch America will buy out-of-region Qwest wholesale service in order to serve those customers at cutover, but is free to reroute the services to use other network facilities or its own.

Letter from Peter A. Rohrbach, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, May 22, 2000.

<sup>52</sup> Qwest Point by Point Response at 21.

<sup>53</sup> *Id.* at 21. See also the March 10th Order, para. 44 ("the 1996 Act expanded the range of permissible activities in which BOCs could engage, including the provision of out-of-region services."). See 47 U.S.C. § 271(b)(2). AT&T also points out that the Bilateral Wholesale Agreement makes reference to a Buyer Marketing Agreement, which Qwest fails to provide in its filings to the Commission. AT&T Reply Comments at 20. Qwest explains in its response to AT&T that the Bilateral Wholesale Agreement "has been amended to eliminate those erroneous references to a document that does not, and never did exist." Qwest Point by Point Response at 24; Qwest June 21 *Ex Parte* at 3.

<sup>54</sup> AT&T Comments at 8; AT&T *Ex Parte* at 15.

Qwest is free to provide out-of-region service to customers pursuant to pre-existing contracts using the combined in-region and out-of-region volume commitments and discount for the duration of the current contract term.

19. We have very serious concerns, however, about the potential for contracts with the combined volume commitments and discount provisions to be renewed. Negotiation by Qwest of such contract renewals appears tantamount to joint marketing of in-region interLATA service and out-of-region service.<sup>55</sup> Renewal of these contracts is particularly questionable when the volume commitments and discounts affect the price customers pay for the prohibited in-region interLATA service. Moreover, the combined volume commitments and discounts foster the impression that Qwest can offer a "package" of in-region and out-of-region interLATA service. Accordingly, renewal of these contracts would raise very serious questions as to future compliance with section 271. Given that the renewal issue for any given contract does not arise until the expiration of the current contract term, we conclude that the divestiture can proceed as proposed. We emphasize that Qwest is likely to run afoul of section 271 if it negotiates or renews contracts with combined volume commitments or joint discounts.

20. In order to facilitate customer transitions, however, we will permit Qwest and Touch America a 150-day transition period from the date of the divestiture. Any contract that expires during the first 150 days after divestiture may be continued under existing terms, including the combined volume commitments and joint discounts, until Qwest and Touch America negotiate customer contracts with independent volume commitments and discounts, or until the end of the 150-day period, which ever comes first.<sup>56</sup> These contracts may be extended for the duration of the 150-day period only at the option of the customer. Furthermore, contracts containing combined volume commitments or joint discounts that expire after the 150-day transitional period may not be renewed with those terms and must be separately renegotiated by Qwest and Touch America.<sup>57</sup> We view this 150-day period as a transitional measure that will not impact Qwest's section 271 incentives but will permit Qwest and Touch America a reasonable period of time to notify customers of the need to replace the current combined volume commitments or joint discounts, renegotiate contracts that come up for renewal, as well as prepare their internal billing and administrative systems for the necessary changes.<sup>58</sup>

21. We will also permit Qwest to assign to Touch America the in-region portion of existing contracts with third-party sales agents and distributors, which permit these agents to earn

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<sup>55</sup> This problem does not arise with existing contracts because they have already been negotiated.

<sup>56</sup> For example, Qwest or Touch America may continue on its original terms for 120 days a contract with a combined volume commitment or joint discount that expired 30 days after the merger.

<sup>57</sup> Moreover, offers made prior to the divestiture but not reduced to contracts binding on all parties until after the divestiture are not pre-existing contracts and are not to contain combined volume commitments or joint discounts.

<sup>58</sup> We expect the independent auditor to review each contract involving shared volume commitments or discounts to ensure that Qwest and Touch America comply with the requirements of this Order. The independent auditor must report any discrepancies to the Chief of the Common Carrier Bureau.

commissions based upon combined Touch America in-region interLATA and Qwest out-of-region interLATA sales. These agents are not exclusive representatives of Qwest and Touch America and may sell the services of a variety of carriers competing with them. Touch America will be responsible for paying all commissions on in-region sales "and meeting other in-region-related obligations."<sup>59</sup> Simultaneously, Qwest will remain responsible to the agents and distributors for existing out-of-region obligations.<sup>60</sup> This arrangement will be available only for pre-existing contracts with agents and distributors and thus does not entrench Qwest's relationship with the in-region local exchange customers on a going-forward basis.<sup>61</sup> However, as is the case with end user volume discounts based on combined Qwest and Touch America traffic volumes, we are concerned here about the renewal of contract terms permitting sales agents and distributors to earn commissions based upon combined sales of Qwest and Touch America services.<sup>62</sup> Renewal of these contracts or execution of new contracts with these joint commissions could foster the impression that Qwest can offer a "package" of in-region interLATA and out-of-region interLATA service. As we point out in the context of the contracts for joint discounts and volume commitments, the renewal issue for any given contract does not arise until the expiration of the current contract term. Therefore, we conclude that the divestiture can proceed as proposed.

22. In order to facilitate the divestiture we will permit Qwest and Touch America a 150-day transition period from the date of the divestiture. Any contract with a sales agent or distributor that expires during the first 150 days after divestiture may be continued under the existing commission structure until Qwest and Touch America separately negotiate contracts with these sales agents and distributors, or until the end of the 150-day period, whichever comes first. Furthermore, sales agent and distributor arrangements containing joint commissions that expire after the 150-day transitional period may not be renewed with those terms.<sup>63</sup> We view this 150-day period as a transitional measure that will not impact Qwest's section 271 incentives but will permit Qwest and Touch America a reasonable period of time to notify sales agents and distributors of the need to replace the current combined commissions, renegotiate contracts that come up for renewal, as well as prepare their internal billing and administrative systems for the necessary changes.<sup>64</sup>

23. The record does not support AT&T's assertion that the Applicants have failed to

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<sup>59</sup> Divestiture Report at 23.

<sup>60</sup> *Id.* at 23.

<sup>61</sup> *Compare AT&T v. Ameritech*, 13 FCC Rcd at 21467-68, para. 41.

<sup>62</sup> This problem does not arise with existing contracts because they have already been negotiated.

<sup>63</sup> Moreover, offers made prior to the merger but not reduced to contracts binding on all parties until after the merger are not pre-existing contracts and are not to contain the joint commission structure.

<sup>64</sup> We expect the independent auditor to review each contract involving combined commissions to ensure that Qwest and Touch America comply with the requirements of this Order. The independent auditor must report any discrepancies to the Chief of the Common Carrier Bureau.

state in the divestiture report, with respect to the leasing of voice and data ports, whether the traffic being transported by U S WEST would cross LATA boundaries.<sup>65</sup> As Qwest has detailed in its filings, Qwest will provide no in-region interLATA service to customers.<sup>66</sup> The carriage of traffic that originated in U S WEST territory across LATA boundaries by the merged entity prior to section 271 authorization for the originating states would be a *per se* violation of section 271.

24. Finally, we disagree with AT&T that the 3-year prohibition on out-of-region competition by Touch America is a “naked restraint of trade” contrary to the public interest.<sup>67</sup> As Qwest points out, Touch America is restricted only in competing for the out-of-region business of Qwest’s existing customers whose in-region business is being transferred to Touch America. However, the non-compete provisions do not prevent Touch America from immediately competing out-of-region to serve any customer not currently served by Qwest, as well as any wholesale transport customers, or its own pre-existing customers. Moreover, according to the record, Touch America freely negotiated the non-compete provisions. In fact, Qwest is subject to much broader non-compete provisions. For a three-year period Qwest may not compete with Touch America in providing *any* in-region interLATA services to Transferred Customers even if Qwest obtains section 271 authorization.<sup>68</sup>

### C. Transitional Support Services

25. We find that, under the unique circumstances presently before us, the support services Qwest proposes to provide Touch America do not constitute the “provision” of prohibited in-region interLATA service and are consistent with section 271 of the Act. Contrary to AT&T’s contentions,<sup>69</sup> we are not sanctioning *de minimis* violations of section 271. Instead,

<sup>65</sup> AT&T Comments at 5 n. 11. While the original divestiture plan filed on October 19, 1999, mentioned that “[b]uyer may contract to lease [the use of] ports on Qwest data switches . . .,” the actual divestiture report filed on April 14, 2000, provides for the sale of such ports, as opposed to leasing. See Qwest Response to Comments, Attachment C, Divestiture Plan (Oct. 18, 1999) at 7; Divestiture Report at 19. Therefore, U S WEST is not transporting the traffic across LATA boundaries.

<sup>66</sup> See, e.g., Applications at 14 (As of closing, Qwest will not be providing any RBOC-prohibited in-region interLATA services. Qwest will transfer all presubscribed retail customers in the U S WEST region to another carrier or carriers.”); Qwest Response to Comments on Applications for Transfer of Control, CC Docket No. 99-272 (Oct. 18, 1999) at 30 (Qwest Oct. 18 Response to Comments) (“The Application already includes a commitment that, in order to comply with Section 271 of the Act, Qwest will discontinue providing prohibited interLATA services in U S WEST’s 14-state region as of the merger closing.”), Qwest Oct. 18 Response to Comments, Attachment C, Qwest Plan for Divestiture of InterLATA Business in the U S WEST Region (Divestiture Plan) at ; and Divestiture Report at 9, 13-28.

<sup>67</sup> AT&T Comments at 14; AT&T *Ex Parte* at 19.

<sup>68</sup> “Covenants not to compete often appear . . . in contracts for the sale of a business. In these contexts such covenants do not violate Section 1 [of the Sherman Act] so long as they are ancillary to a significant lawful business purpose of the contract and are reasonably limited in scope to protecting the covenantee’s legitimate interest.” Qwest Point by Point Response at 17, *quoting* ABA Section of Antitrust Law, Antitrust Law Developments, vol. 1 at 124-25 (4th ed. 1997).

<sup>69</sup> AT&T *Ex Parte* at 14-15.

we conclude that the challenged support services do not rise to the level of the “provision” of prohibited in-region interLATA service under the test in *AT&T v. Ameritech*. As discussed in more detail below, our conclusion rests in significant part on the transitional nature of these support services to be provided by Qwest and the fact that Touch America has substantial control over the limited, transitional period during which Qwest will provide these services. We also emphasize that, contrary to AT&T’s assertion, the arrangement does not permit Qwest to “hold itself out” to consumers as an in-region interLATA long distance provider since in most, although not all, cases Qwest’s provision of support services to Touch America will not be apparent to in-region interLATA customers.<sup>70</sup> These factors stand in sharp contrast to the circumstances in *AT&T v. Ameritech* where the service offering was marketed to potential customers on an ongoing basis under the BOC brand and was subject to substantial BOC control.<sup>71</sup>

26. In the instant case, Qwest will provide Touch America with the following support services for a limited period of time to ensure that the transferred customers can be successfully incorporated into Touch America’s business operations:<sup>72</sup>

- **Customer Welcome Materials.** Qwest will provide “customer welcome fulfillment” materials, including processing and distribution of Touch America-branded welcome materials and calling cards to transferred customers. This service will be provided for 90 days.
- **Order Entry Services.** Qwest will manually enter handwritten data from sales forms into computer systems to set up new customer accounts. This service will be provided for six months.
- **Knowledge Transfer Services.** Qwest will provide technical staff to support Touch America’s network functions such as transferring data from the Qwest system to the Touch America system; explaining maintenance and network

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<sup>70</sup> *AT&T v. Ameritech* 13 FCC Rcd 21470, para. 45; AT&T Comments at 17.

<sup>71</sup> *AT&T v. Ameritech* 13 FCC Rcd 21470, para. 45.

<sup>72</sup> AT&T points out that Touch America may unilaterally terminate the Transition Services Agreement on 30 days’ notice, but that the Stock Purchase Agreement, which governs, among other things, the calculation and allocation of volume minimums, cannot be terminated by Touch America alone. AT&T Comments at 12 n.37. Qwest and Touch America have modified the Stock Purchase Agreement to limit the scope of the provision requiring coordination upon termination of the Transition Services Agreement. Qwest Point by Point Response at 12-13. Qwest states that the revised provision reflects Qwest and Touch America’s intention that they will separately negotiate any new arrangements with pre-divestiture common existing customers. Qwest Point by Point Response at 12. “Common existing customers” refers to “customers served by Qwest prior to the divestiture, whose Section 271-implicated in-region services are being transferred to Touch America, but who will continue to purchase out-of-region and/or non-271 implicated services from Qwest.” Qwest June 21 *Ex Parte* at 3; Qwest and Touch America also have agreed to refrain from separately renegotiating these arrangements in a way that affects either Touch America or Qwest’s ability to deliver its own services to the customer without the consent of the other party. *Id.* at 12.

management and assisting in the installation of software. This service will be provided for six months.

- **Professional Services.** Qwest will detail customer service representatives and technical staff to Touch America to assist on “major account” matters involving large commercial national customers. These Major Account Support Team (MAST) agents will work under Touch America’s direction and control and will use Touch America’s brand name in all interactions with customers.<sup>73</sup> Qwest will provide professional services for a period of six months.
- **Billing and Collection.** Qwest will provide billing and collection services to Touch America customers using Touch America rate tables. For business customers and the minority of residential customers who have their long distance charges direct-billed on a Touch America-branded invoice, Qwest will mail invoices bearing a Touch America brand name and logo. If U S WEST is the customer’s incumbent local exchange carrier, U S WEST will continue to perform billing and collection, as it does today for unaffiliated interexchange carriers.<sup>74</sup> Qwest will provide billing and collection for a period of one year. Touch America may renew this option for up to two six-month periods.
- **Software Licensing.** Qwest will license to Touch America the databases, proprietary client software and information systems currently used to bill and collect revenues and provide customer care and set up new accounts. Qwest will also provide data processing services, relating to Touch America’s telecommunications offerings. Qwest states that it will create security precautions and “firewalls” so that Qwest sales staff and customer service representatives have no access to information regarding services provided by Touch America, and vice versa. Qwest will provide software licensing for a period of one year. The agreement permits Touch America to renew this option for up to two six-month periods.
- **Switch Monitoring and Maintenance.** Qwest will monitor and maintain the four in-region circuit switches that Touch America is leasing. Qwest will also maintain multiplexers and digital cross-connect systems associated with those switches. Qwest will provide switch monitoring and maintenance for a period of one year. The agreement permits Touch America to renew this option for

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<sup>73</sup> MAST agents will perform such functions as: (i) answer questions about customer bills; (ii) implement order changes; and (iii) respond to customer technical problems by issuing network trouble tickets and solve technical problems referred from the call center. Divestiture Report at 35-36.

<sup>74</sup> For customers that purchase both in-region services from Touch America and out-of-region services from Qwest, Qwest will prepare and mail bills that state Qwest is providing out-of-region services and Touch America is providing in-region services. Divestiture Report at 38.

up to two six-month periods.<sup>75</sup>

27. Touch America states that it is purchasing support services from its future competitor in order “to preserve the optimal value of the transaction” by retaining as many customers as possible.<sup>76</sup> As Touch America points out, most of the transitional provisions involve existing customers that had previously entered into *bona fide* agreements with Qwest and are being transferred to Touch America. Touch America adds that these support services are necessary on a transitional basis because Touch America will be increasing its customer base dramatically within a short time frame and cannot increase its in-house staffing and infrastructure immediately to accommodate this level of growth.<sup>77</sup>

28. Balancing Test. We conclude that Qwest will not obtain material benefits uniquely associated with the ability to include an in-region interLATA component in its services through the provision of transitional services to Touch America.<sup>78</sup> The main benefit to Qwest is that customers perceive no diminution in their quality of service as they are transferred to Touch America as part of the proposed divestiture.<sup>79</sup> We find that, under the present circumstances, this does not violate section 271. The provision of these support services does not permit Qwest to “become a comprehensive ‘one-stop shopping’ source for local and long distance services when [it] [has] not adequately opened [its] local markets.”<sup>80</sup> Moreover, Touch America is a recent entrant and, unlike a BOC, is not prevented from competing in the combined services market, in sharp contrast to the restrictions applicable to BOCs as described in *AT&T v. Ameritech*. Customers will not perceive Qwest as a single-source for both in-region interLATA and out-of-region long distance services, and Qwest will not receive the kind of material benefits the Commission found to exist in *AT&T v. Ameritech*. We believe that the precautions taken by Qwest and Touch America will ensure that there is no customer confusion concerning the identity of the in-region interLATA services provider.<sup>81</sup>

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<sup>75</sup> Divestiture Report at 34-39.

<sup>76</sup> Touch America Reply Comments at 11.

<sup>77</sup> *Id.* According to Touch America, “[i]ndustry experience demonstrates that customers, when confused by changes in ownership, decide to change their service provider.” *Id.*

<sup>78</sup> *AT&T v. Ameritech* 13 FCC Rcd at 21466, para. 38.

<sup>79</sup> Touch America Reply Comments at 5.

<sup>80</sup> 13 FCC Rcd at 21466-67, para. 39.

<sup>81</sup> See, AT&T Comments at 13, 20-21 (alleging that Qwest and Touch America employees are likely to coordinate marketing and sourcing—Qwest will appear to offer one stop shopping). Qwest Point by Point Response at 13-14 (Qwest and Touch America employees won’t share office space—companies will not have access to each others’ data for marketing purposes); Qwest Divestiture Compliance Report at 35-37, 41-42 (members of Qwest Major Account Support Team providing transitional support services to Touch America will work under Touch America’s direction and will use the Touch America brand name—Qwest will institute security measures to ensure that Qwest sales staff and customer service representatives do not have access to Touch America’s data and vice versa). AT&T Comments at 6, 21 (alleging that dual branding will cause customers to (continued....))



29. We also conclude that Qwest is not holding itself out to the public as a provider of prohibited in-region interLATA service. Qwest will not market or sell prohibited in-region interLATA services alone or as part of another service offering. Instead, Qwest will provide a limited range of transitional support functions to Touch America. In most respects, customers will not even be aware of the support services provided by Qwest.<sup>82</sup>

30. Furthermore, based on the record before us, we find that Qwest will not be performing functions typically performed by a reseller as was the case in *AT&T v. Ameritech*.<sup>83</sup> Qwest will not “exercise strong prospective influence over the prices, terms, and conditions of the long distance services provided [by Touch America],”<sup>84</sup> except insofar as existing contracts are being transferred to Touch America. In those cases, Touch America is bound by the terms of the pre-existing contract that it has purchased, but we do not find this objectionable under the circumstances of the proposed divestiture. With this exception, Touch America has sole control over pricing for its in-region interLATA services<sup>85</sup> and will make its own decisions about marketing and promotions, and retain ultimate control over its own network facilities.<sup>86</sup> We also believe that it is significant that Qwest will be performing the type of services that carriers frequently “outsource” to third party vendors.

31. We cannot agree with AT&T’s contention that Qwest would have “effective control” over Touch America’s in-region interLATA offering and be able to pre-position itself for future long distance offerings once it receives section 271 authority.<sup>87</sup> The fact that the Stock Purchase Agreement permits Qwest to modify or supplement the Services Contract with the consent of Touch America does not give Qwest an unacceptable level of control over Touch America. Qwest states that this provision of the Stock Purchase Agreement has been amended to

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see Qwest as one stop source for local, in-region and out-of-region toll service). Qwest Point by Point Response at 5, 6, 20-21 (dual branding limited to initial six month period for most affected customers, with dual branding continuing for additional period in case of certain large business customers with in-region headquarters---dual branding only applies to pre-existing customers).

<sup>82</sup> Divestiture Report at 45; Qwest Point by Point Response at 20; AT&T *Ex Parte* at 20, 21 (claiming customers will perceive Qwest and Touch America offerings as an integrated service.)

<sup>83</sup> AT&T Comments at 6-7 (alleging that Qwest will be performing functions typical of a reseller). Qwest Point by Point Response at 4-5 (Qwest won’t provide support services in its own name—support services terminate within reasonable time period). AT&T Comments at 6 (alleging that Qwest will disconnect Touch America customers based on Qwest’s standards). Qwest Point by Point Response at 6 (Touch America is free to use Qwest disconnect standards).

<sup>84</sup> 13 FCC Rcd at 21472, paras 46, 47.

<sup>85</sup> Touch America Reply Comments at 9; *see also* AT&T Comments at 19.

<sup>86</sup> See AT&T Comments 19; Touch America Reply Comments at 9. Contrary to AT&T’s assertion, we do not believe that the involvement of MAST employees during the initial six-month transitional period makes Qwest a reseller. Divestiture Report at 35-37, 41-42; AT&T Comments at 6-7.

<sup>87</sup> AT&T Comments at 22.

make explicit “that each of the carriers is free to renegotiate its respective service contracts with customers. The one exception is that Qwest cannot modify, absent Touch America’s consent, its contract for out-of-region services with a pre-divestiture customer in a way that would impact Touch America’s provision of in-region services to that same customer, and vice versa.”<sup>88</sup> We conclude that this provision does not confer control of the type found to exist in *AT&T v. Ameritech*.

32. We conclude that Qwest and Touch America have not agreed to work together to develop a plan for delivery of customer care services after the conclusion of the transition period based on Qwest’s representation that “[t]here is *no* such agreement to work together, and *no* coordinated delivery of services or products after the termination of the Transition Services Agreement.”<sup>89</sup> We note that Qwest’s representation that there will be no such coordination for delivery of products or services is one of the factors central to our finding that the divestiture agreement does not violate section 271.<sup>90</sup> Accordingly, we do not expect the provision of transitional support services discussed here to extend beyond the maximum two-year term in the current agreement.<sup>91</sup> We believe that as Touch America gains the resources to assimilate the divested business operations, it will reduce its reliance on Qwest. Indeed, it is in Touch America’s own interest to do so. Our finding concerning these transitional support services is based, in part, on the fact that Touch America, a competitor of Qwest, is an independent entity that negotiated these agreements on an arm’s length basis, and that Qwest will not be reacquiring the divested businesses. We must caution Qwest and U S WEST that our “totality of the circumstances” analysis is based upon the entire record in this proceeding and, in particular, on the transitional nature of the support services Qwest is offering to Touch America. If the divestiture and on-going relationships do not comport, in practice, with the representations in the divestiture report, Qwest runs the risk of violating section 271.

33. Finally, the fact that Qwest has indicated that it may enter into unspecified joint marketing arrangements with carriers other than Touch America in the future does not alter our conclusion on this point.<sup>92</sup> The Commission has specifically stated that “the 1996 Act

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<sup>88</sup> Qwest Point by Point Response at 9.

<sup>89</sup> *Id.* at 7-8; Touch America Reply Comments at 14 (“AT&T points to a reference in the Bilateral Wholesale Agreement to a ‘Buyer Coordinated Marketing Agreement.’ No such agreement exists or is planned, and Touch America has executed an amendment to the Bilateral Wholesale Agreement deleting the reference to such an agreement.”).

<sup>90</sup> Qwest also points out that the provision that Qwest would be the lead party in delivery of customer care to Common Existing Customers has been changed. Qwest Reply Comments at 10; AT&T Comments at 7. Qwest states that Qwest and Touch America have modified the Stock Purchase Agreement to clarify that each carrier is independently responsible for delivering customer care services with respect to their own services. Qwest Point by Point Response at 8.

<sup>91</sup> See *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, FCC 00-221(rel. Jun. 16, 2000) paras. 87-88.

<sup>92</sup> Divestiture Report at 36.

contemplates that certain business arrangements between BOCs and non-affiliated long distance entities, that may include some marketing dimension, would be permissible.”<sup>93</sup> But the Commission has also stated that such marketing would be permitted only if “the BOC [made] no representation that such product or service is associated with its name or services . . .”<sup>94</sup> We cannot determine the legality of possible future joint marketing arrangements without more information. Should Qwest enter into such an agreement, however, we emphasize that it would do so at its own risk.

#### **D. Special Products Arrangements**

34. In addition to the businesses that Qwest has sold to Touch America, the companies have agreed to “special product arrangements” to jointly sell: (i) prepaid cards; (ii) calling cards; and (iii) operator services. However, Qwest emphasizes that it “will have no involvement in determining Touch America’s prices for [these] in-region services.”<sup>95</sup> Qwest will also supply support services associated with these special products. We agree with Qwest’s contention that none of the special products arrangements and their support services violate *AT&T v. Ameritech* or other Commission precedent.

35. Qwest will divest its in-region prepaid long distance card business to Touch America. Post-divestiture, prepaid cards and accompanying point-of-sale materials will identify Touch America as the in-region provider and Qwest as the provider elsewhere.<sup>96</sup> Post-divestiture, Qwest will continue to provide long distance service including calling cards to out-of-region customers. Touch America, however, will carry calls of Qwest’s out-of-region calling card customers when they travel to the 14 U S WEST states and place calls using their calling cards.<sup>97</sup> Qwest will also divest the in-region component of its “operator services”<sup>98</sup> such as calls

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<sup>93</sup> Qwest Point by Point Response at 24; 13 FCC Rcd at 21474, n.168.

<sup>94</sup> *AT&T v. Ameritech* at para. 50.

<sup>95</sup> Divestiture Report at 49.

<sup>96</sup> Touch America will receive its share of the revenue corresponding to the in-region service it provides based on the number of in-region minutes sold each month. Qwest states that it will defer to Touch America and set its out-of-region rates to match Touch America’s in-region rates using Touch America’s rate tables. Qwest will provide support services including printing and distribution of cards. Qwest will also provide Touch America with contract management services with card distributors. *Id.* at 60–62. This arrangement is limited to a two-year term.

<sup>97</sup> Touch America will provide all transport regardless of whether the calls terminate in-region or out-of-region. Business customers with both in-region and out-of-region service, but with a majority of service out-of-region will receive Qwest-branded cards. Touch America will provide in-region service to these customers under its own brand name. In-region customers will receive “Touch America” branded calling cards. When these customers travel out-of-region and use these Touch America cards, Qwest will “handle” the call. Qwest’s support services for these calling cards will include billing and collection, as well as the calling card platform services. All platform services will be branded with the Touch America name and logo. Divestiture Report at 50, 57. Qwest Point by Point Response at 7.

using 0+, 0-, 101-XXXX, and similar dialing patterns to Touch America.<sup>99</sup> Touch America will provide all calls and service all requests for operator services from in-region payphones, hotel phones and other aggregator-operated phones.<sup>100</sup>

36. We disagree with AT&T that Qwest enjoys an undue level of involvement with respect to the prepaid cards, calling cards and operator services.<sup>101</sup> Qwest points out that all of the in-region services will be handled by Touch America, and will be branded as such, and that Touch America will have sole and exclusive control over the pricing of its services.<sup>102</sup> With respect to prepaid cards, Qwest expressly states that Touch America will control the rates for both its own in-region prepaid card service and Qwest's out-of-region prepaid card service, and Touch America has "sole discretion with respect to establishing the rates."<sup>103</sup> Thus, Qwest's involvement is limited and does not impact Touch America's independence from Qwest, or implicate any of the standards articulated in *AT&T v. Ameritech*.<sup>104</sup>

#### **E. Global Services Provider Arrangement.**

37. In the March 10th Order, we stated that the Applicants must provide information

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<sup>98</sup> "Operator services" means "any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than . . . (A) automatic completion with billing to the telephone from which the call originated; or (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer." 47 U.S.C. § 226(a)(7).

<sup>99</sup> Divestiture Report at 87.

<sup>100</sup> These services will bear the Touch America name and logo, and Touch America will control the pricing. Touch America also will be responsible for maintaining interstate, intrastate and informational tariffs. Touch America will replace Qwest as the contract partner with others involved in the service. Qwest also proposes to supply support services associated with the operator services business. Specifically, Qwest will perform billing and collection; connecting aggregators' national directory assistance calls to the appropriate incumbent local exchange carrier, on a contractual basis; trouble-shooting and repair reported via a "211" dialing code; providing customer service functions to aggregators on behalf of Touch America and tracking and providing information regarding commissions due to in-region aggregators, paid by Qwest on Touch America's behalf. Qwest will provide these support services for a period extending six-months beyond the expiration of the last pre-divestiture contract with an aggregator assigned to Touch America. *Id.* at 86-89.

<sup>101</sup> AT&T Comments at 8-11; AT&T *Ex Parte* at 9. We further disagree with AT&T's contention that Qwest's offering of support services for these special product arrangements is a violation of section 271. AT&T Comments at 16-17. Divestiture Report at 54-56 (dealing with calling cards), 61-63 (dealing with prepaid calling cards), and 87-89 (dealing with operator services).

<sup>102</sup> Qwest Point by Point Response at 12; Divestiture Report at 51-54:

<sup>103</sup> Qwest Point by Point Response at 10-11.

<sup>104</sup> We note that this conclusion concerning pre-paid calling cards is consistent with the Common Carrier Bureau's order in *AT&T Corp. v. BellSouth Corp., and its Carrier Subsidiaries and Affiliates, et. al.*, Memorandum Opinion and Order, DA 99-609, (1999) (*BellSouth*) paras. 1, 16, *application for review pending*.

on how they intend to operate Qwest's Internet backbone without originating Internet traffic in the 14-state U S WEST region,<sup>105</sup> and how the merged company will dispose of Internet addresses and web-hosting servers for their Internet customers.<sup>106</sup> Qwest states that "at divestiture it would discontinue the provision of any prohibited in-region interLATA backbone service crossing U S WEST LATA boundaries."<sup>107</sup> Qwest also states that Concentric Network Corporation (Concentric) will provide service as the Global Service Provider (GSP) for most of the in-region customers to whom Qwest provides dial-up Internet access service. Touch America will be the GSP for in-region customers of Qwest's Internet services including broadband dedicated Internet access and web hosting services.<sup>108</sup> Qwest also states:

Touch America will connect with Internet backbone providers other than Qwest, and in that manner provide connections to the global Internet. Touch America will provide GSP service using its own transmission network and, at least initially, interconnection arrangements with Cable & Wireless in Seattle and Genuity in Denver. Qwest will lease the use of router equipment in those two cities to Touch America for use in these arrangements, and will monitor and maintain this equipment on Touch America's behalf. Touch America is free to make other arrangements to provide its GSP services going forward, subject to maintaining certain service level commitments for the benefit of Internet customers.<sup>109</sup>

38. Upon review of Qwest's divestiture report, as amended, we find that Qwest's proposed arrangements with its GSPs, Touch America and Concentric, are acceptable under section 271.<sup>110</sup> Qwest, as the Internet service provider (ISP), will hand its traffic off to the GSP.

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<sup>105</sup> March 10th Order, paras. 3 n. 8, para. 25.

<sup>106</sup> *Id.*, para. 25 n. 83.

<sup>107</sup> Qwest June 7 *Ex Parte*.

<sup>108</sup> *Id.* at 1. In particular, Qwest states:

Touch America will provide the same kind of GSP services as Concentric will to dial-up customers. Specifically, Qwest will continue to sell dedicated Internet access and other services to in-region customers. Touch America will assume responsibility to act as the GSP for those customers, and in that capacity Touch America will provide end users with connectivity to the Internet via its arrangements with other backbone providers. Touch America will not offer those divested customers connectivity between Qwest in-region and out-of-region routers, as originally planned.

*Id.* at 2. Touch America will also "provide GSP services to some customers who use Qwest Internet access services on a dial-up basis." Qwest June 21 *Ex Parte* at 2.

<sup>109</sup> Qwest June 21 *Ex Parte* at 2.

<sup>110</sup> These arrangements are similar to GSP arrangements used by other BOCs, including U S WEST, "in connection with their own provision of Internet services to in-region customers." Qwest June 7 *Ex Parte* at 2. Addressing AT&T's concern, we believe we now have sufficient information to make this determination (continued....)

The GSP will carry the traffic across in-region LATA boundaries and then out-of-region to the Internet using its own network or "via its arrangements with other [Internet] backbone providers."<sup>111</sup> Neither GSP will direct traffic to a Qwest router out-of-region.<sup>112</sup> We, therefore, do not reach the issues raised by AT&T, since they relate to a GSP model which has been superceded by a subsequent *ex parte* filing.<sup>113</sup> We are satisfied that Qwest need not dispose of Internet addresses and web-hosting servers because Qwest will not be providing any in-region interLATA transmission used in connection with Internet service.<sup>114</sup> We note that Qwest states that in the future, it may "provide Internet service to in-region customers on a different, but legally permissible, basis from the arrangements that will apply at divestiture."<sup>115</sup> If Qwest does decide to change these arrangements we require that it notify the Chief of the Common Carrier Bureau prior to making such a change.<sup>116</sup>

#### F. Section 271 Compliance by Qwest Affiliates

39. In the March 10th Order, we stated that Qwest must provide information on whether any on-going Qwest business concern or affiliation raises section 271 issues.<sup>117</sup> The Communications Act defines an "affiliate" as any "person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person."<sup>118</sup> The term "own" means "to own an equity interest (or the equivalent thereof) of more than 10 percent."<sup>119</sup> In its divestiture report, Qwest identifies six such affiliates. We are satisfied by Qwest's representations that "none of these companies will be providing in-region interLATA services by the time of closing of the merger."<sup>120</sup> We also accept Qwest's representations that post-merger, it "intends to comply fully with all applicable statutory and regulatory requirements

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regarding Qwest's Internet services. Letter from Aryeh S. Friedman, Senior Attorney, AT&T, to Magalie Roman Salas, Secretary, FCC, June 13, 2000; Qwest June 21 *Ex Parte*

<sup>111</sup> Qwest June 7 *Ex Parte* at 2; Qwest June 21 *Ex Parte* at 2.

<sup>112</sup> Qwest June 7 *Ex Parte* at 2; Qwest June 21 *Ex Parte* at 2.

<sup>113</sup> Qwest June 7 *Ex Parte*.

<sup>114</sup> Divestiture Report at 63 n. 89.

<sup>115</sup> Qwest June 7 *Ex Parte* at 2.

<sup>116</sup> This is limited to agency notification. Qwest need not obtain agency approval before making such a change.

<sup>117</sup> March 10th Order, paras. 3, 23-25, 27.

<sup>118</sup> 47 U.S.C. § 153.

<sup>119</sup> *Id.*

<sup>120</sup> Divestiture Report at 91.

governing corporate structure and affiliate transactions.<sup>121</sup>

40. Qwest states that it owns the indicated interests in the following: Advanced Radio Telecom Corporation (ART), a wireless service provider (19% equity interest);<sup>122</sup> Apex Global Internet Services, Inc. (24 percent equity interest);<sup>123</sup> KPNQwest, N.V., a European joint venture of Qwest and KPN, a telecommunications concern based in the Netherlands (44 percent equity interest);<sup>124</sup> Slingshot Networks, LLC, a production and video storage services company with locations in Nashville, Tennessee, and Los Angeles, California, which Qwest states does not perform in-region interLATA telecommunications services (50 percent equity interest);<sup>125</sup> Hawk Holdings, L.L.C., an “Internet incubator . . . which invests in early-stage Internet companies, providing them with intellectual and financial capital” (approximately 30 percent equity interest);<sup>126</sup> and Qwest Cyber.Solutions, which provides applications services using in-region facilities such as those in Denver or Seattle, but will not offer in-region interLATA transmission in connection with those services after the merger closes (51 percent equity interest).

41. We are satisfied with Qwest’s representations regarding these companies that it will reduce its ownership below a 10 percent equity interest should any of these or other affiliates provide in-region interLATA telecommunications services. We further note that Qwest must ensure that Qwest does not violate section 271 by, for example, maintaining an interest greater than 10 percent in any company providing interLATA services within the U S WEST region.<sup>127</sup>

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<sup>121</sup> *Id.*, at 103.

<sup>122</sup> According to Qwest, ART has informed Qwest that it provides Internet services to approximately 300 customers in the U S WEST region over wireless and wireline connections. ART has told Qwest that it provides no other in-region interLATA telecommunications services to any other customers. Qwest further states that ART has informed Qwest that it “intends to terminate services to those subscribers prior to the closing of the Qwest-U S WEST merger.” See Divestiture Report at 91.

<sup>123</sup> On February 25, AGIS filed for Chapter 11 bankruptcy reorganization in United States Bankruptcy Court, Eastern District of Michigan, Southern Division. On May 19, 2000, AGIS ceased its business operations and sold substantially all of its business assets to Telia Internet, Inc. Because AGIS is no longer providing any services, and will be liquidated pursuant to a plan overseen by the U S Bankruptcy Court, Qwest states that its “position with respect to this debtor company presents no [s]ection 271 issues.” Letter from Peter A. Rohrbach, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, June 14, 2000.

<sup>124</sup> KPNQwest owns a “pan-European broadband fiber network, and provides Internet protocol services such as Internet access service, backbone and transit services for other Internet service providers and telecommunications carriers (including transmission in the DWDM and ATM formats), web hosting (including streaming multimedia content) and dark fiber.” Divestiture Report at 95.

<sup>125</sup> Divestiture Report at 95-96.

<sup>126</sup> Qwest states that Hawk Holdings is not itself a provider of telecommunications services, and has no plans to provide in-region interLATA services. Divestiture Report at 96-97.

<sup>127</sup> See March 10th Order, para. 34-37. Moreover, we find that Qwest may not acquire ART’s Internet access customers prior to obtaining section 271 authorization.

#### IV. COMPLIANCE AND AUDITING PROVISIONS

42. On-going compliance by the merged company with section 271 is critically important. When Qwest proceeds with the merger, it must comply with the safeguards established in the March 10th Order.<sup>128</sup> Among other things, in the March 10th Order we required that a senior Qwest executive certify under oath, annually, that all of Qwest's activities are consistent with Qwest's representations to the Commission and that it continues to comply with section 271 and the terms and conditions of the March 10th Order. In order to further ensure section 271 compliance, we also required in the March 10th Order that the Applicants hire an independent auditor, acceptable to the Chief of the Common Carrier Bureau, to perform an annual examination engagement regarding the merged company's *on-going* compliance with section 271.<sup>129</sup> Finally, we required that the independent auditor immediately report any information that may suggest a section 271 violation, as well as any corrective action taken, to the Chief of the Common Carrier Bureau.<sup>130</sup> In this order, we impose the additional requirement that a senior Qwest executive certify under oath, annually, that all of Qwest's activities comply with the terms and conditions of the instant order. These certification and auditing provisions will greatly increase the likelihood that possible future violations of section 271 will be brought to our attention.

#### V. CONCLUSION

43. For the reasons discussed above, we find that Qwest's proposed divestiture of in-region interLATA services, customers, and assets, the limited provisioning of transitional services to effectuate the divestiture, and its proposed special services arrangements do not involve Qwest performing in-region interLATA transmission or amount to the "provision" of in-region interLATA service in violation of section 271 of the Communications Act of 1934, as amended.

#### VI. ORDERING CLAUSES

44. Accordingly, consistent with our March 10, 2000, Order in this matter, which is incorporated herein by reference, having reviewed the divestiture report and amended filings, IT IS ORDERED: that prior to the merger closing and the consummation of any transfer of licenses and lines from U S WEST to Qwest, Qwest must complete the divestiture of the in-region interLATA businesses described in its divestiture report, as amended, and as modified herein.<sup>131</sup>

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<sup>128</sup> *Id.* at para. 27.

<sup>129</sup> *Id.* at para. 27. In this Order we impose the additional requirement that Qwest hire the independent auditor, approved by the Chief of the Common Carrier Bureau, prior to the divestiture taking place.

<sup>130</sup> This paragraph is intended only as a summary of the auditing and certification requirements in the March 10<sup>th</sup> Order. *See id.* paras. 27, 70 and 71, and accompanying footnotes for a detailed description of the certification and auditing requirements.

<sup>131</sup> *See* Divestiture Report; Letter from David L. Sieradzki, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, May 12, 2000, Attachment C (Amendments to Stock Purchase Agreement); Letter from David L. (continued....)



45. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 214, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214, that the domestic section 214 application, to transfer control of TeleDistance, Inc. from Qwest to Touch America, IS GRANTED.

46. IT IS FURTHER ORDERED that each year, on the anniversary of the merger's closing, a senior Qwest executive shall certify under oath, that Qwest's activities on behalf of the buyer are consistent with its representations to the Commission in this proceeding and that it continues to comply with section 271 and the terms and conditions of this order and the March 10th Order.

47. IT IS FURTHER ORDERED prior to the divestiture, the Applicants will be required to hire an independent auditor, acceptable to the Chief of the Common Carrier Bureau, to perform an annual examination engagement regarding the merged company's *on-going* compliance with section 271 as described herein.

48. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release in accordance with 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

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Sieradzki, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, May 15, 2000 (containing latest version of Local Access Assignment and Assumption Agreement; and latest version of the Switch Functionality Access Right Agreement); Qwest June 7 *Ex Parte*; Qwest June 21 *Ex Parte*.